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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/915,070	07/25/2001	Aaron Joel Loyd	10006615-1	6454

7590 11/05/2004

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[REDACTED] EXAMINER

PHILLIPS, HASSAN A

[REDACTED] ART UNIT

[REDACTED] PAPER NUMBER

2151

DATE MAILED: 11/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/915,070	LOYD, AARON JOEL	
	Examiner Hassan Phillips	Art Unit 2151	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 03 March 2003.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-26 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-26 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 25 July 2001 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892) *

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 3/6/03.

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____

5) Notice of Informal Patent Application (PTO-152)

6) Other: _____

DETAILED ACTION

Information Disclosure Statement

1. The Information Disclosure Statements (IDS) filed March 6, 2003, and July 25, 2001, have been received and considered by the Examiner.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claim 8 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 8 recites the limitation "said preselected value" in line 4. There is insufficient antecedent basis for this limitation in the claim. In order for the Examiner to advance prosecution of the application for patent, the Examiner has interpreted the claim as best understood.

Specification

1. The disclosure is objected to because of the following informalities: There is a minor error on page 6, line 22. The applicant describes a network 100 that is in Fig. 1, not Fig. 3. Appropriate correction is required.

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-5, 7, 12-17, 19, 24-26, are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Waclawsky et al. (hereinafter Waclawsky), U.S. Patent 5,974,457 (supplied by Applicant).

3. In considering claims 1 and 13, Waclawsky teaches a method and monitoring device for monitoring the operation of an electronic network, the network comprising a first electronic device and a second electronic device, the method comprising: performing a first measurement of a parameter of the network on a first data path between the first electronic device and the second electronic device; performing a second measurement of the parameter of the network on the first data path between the first electronic device and the second electronic device; comparing the first

*indicate where in the reference?
which one do you consider - 2nd device?*

measurement to the second measurement; and providing an indication in response to the comparison of the first measurement to the second measurement. See col. 7, line 16 through col. 8, line 6.

4. In considering claims 2 and 14, Waclawsky teaches providing an indication if the comparison is greater than a preselected value. See col. 7, lines 60-67, col. 8, lines 1-6.

5. In considering claims 3 and 15, Waclawsky teaches performing a plurality of measurements, and wherein providing an indication comprises providing an indication if a preselected number of the measurements exceed a preselected value. See col. 7, line 16 through col. 8, line 6.

6. In considering claims 4 and 16, Waclawsky teaches performing a plurality of measurements, and wherein providing an indication comprises providing an indication if a preselected number of the measurements exceed a preselected value during a preselected period. See col. 7, line 16 through col. 8, line 6.

7. In considering claims 5 and 17, Waclawsky teaches the parameter being response time. See col. 8, lines 39-49.

8. In considering claims 7 and 19, Waclawsky teaches performing a plurality of measurements of a parameter of the network on a first data path between the first electronic device and the second electronic device; and wherein the providing an indication comprises providing an indication if the value of at least one of the plurality of measurements exceeds the value of the average of previous measurements by a preselected amount. See col. 4, lines 55-67, col. 5, lines 1-4.

9. In considering claims 12 and 24, Waclawsky teaches providing a plurality of measurements of a parameter of the network on a first data path between the first electronic device and the second electronic device, and wherein the providing an indication comprises providing an indication if the values of the plurality of measurements exceed a preselected value for a preselected period. See col. 7, line 16 through col. 8, line 6.

10. In considering claim 25, Waclawsky teaches a method for monitoring the operation of an electronic network, the network comprising a first electronic device and a second electronic device, the method comprising: measure a first response time of data transfers between the first electronic device and the second electronic device; measuring a second response time of data transfers between the first electronic device and the second electronic device; comparing the first response time to the second response time; and providing an indication if the second response time exceeds the first response time by a time greater than a preselected time. See col. 13, lines 32-57.

11. In considering claim 26, Waclawsky teaches a monitoring device for monitoring an electronic network, the network comprising a first electronic device, second electronic device, and at least one data path extending there between, said monitoring device comprising: means for repeatedly measuring a parameter of the network between the first electronic device and the second electronic device and generating measurement data means receiving and comparing the measurement data to a preselected value; and means for providing a notification in response the comparison. See col. 7, line 16 through col. 8, line 6.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 6, 8-11, 18, 20-23, are rejected under 35 U.S.C. 103(a) as being unpatentable over Waclawsky.

3. In considering claims 6, 10, 18, and 22, although the method taught by Waclawsky shows substantial features of the claimed invention, it fails to expressly

disclose: Indicating at least one of a plurality of data paths changing more than a preselected value.

Nevertheless, Waclawsky does teach: Effecting routing changes after being provided with an indication that current network operating characteristics are outside the bounds of normal behavior. See col. 7, lines 60-67, col. 8, lines 1-6.

Hence, it would have been apparent to one of ordinary skill in the art that the teachings of Waclawsky provide a means for indicating at least one of a plurality of data paths changing more than a preselected value, and thus it would have been obvious for a person of ordinary skill in the art to modify teachings of Waclawsky to show this. Doing so would have demonstrated a specific example of how the teachings of Waclawsky could be used to monitor data paths, and determine when a data path is no longer operating normally, Waclawsky col. 7, lines 16-34.

4. In considering claims 8 and 20, although the method taught by Waclawsky shows substantial features of the claimed invention, it fails to expressly disclose: Not using exceeded average values of measurements, or preselected values, to calculate subsequent average values.

Nevertheless, Waclawsky does teach: A benchmark that can accumulate a more accurate average than a predefined average. See col. 4, lines 55-67, col. 5, lines 1-4.

Hence, it would have been apparent to one of ordinary skill in the art that the teachings of Waclawsky provide a means for not using exceeded average values of measurements, or preselected values, to calculate subsequent average values, and

thus it would have been obvious for a person of ordinary skill in the art to modify teachings of Waclawsky to show this. Doing so would have demonstrated a specific example of how the teachings of Waclawsky could be used to progressively accumulate a more accurate representation of expected behavior for a network.

5. In considering claims 9 and 21, although the method taught by Waclawsky shows substantial features of the claimed invention, it fails to expressly disclose: Providing an indication if a measurement exceeds the mean plus three times the square of the mean of a previous measurement.

Nevertheless, Waclawsky does teach: Providing an indication if a measurement exceeds the bounds of normal behavior, col. 7, lines 60-67, col. 8, lines 1-6.

Hence, it would have been apparent to one of ordinary skill in the art that the teachings of Waclawsky provide a means for indicating if a measurement exceeds the mean plus three times the square of the mean of a previous measurement, and thus it would have been obvious for a person of ordinary skill in the art to modify teachings of Waclawsky to show this. Doing so would have demonstrated a specific example of how the teachings of Waclawsky could effectively be used to monitor the operation of an electronic network, Waclawsky col. 7, lines 16-34.

6. In considering claims 11 and 23, Waclawsky teaches providing an indication comprising providing an indication if a preselected number of the measurements exceed

a preselected value a preselected number of times within a preselected period. See col. 7, line 16 through col. 8, line 6.

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-26, are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-19, of copending Application No.'s 09/999582, and 10/032969. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims contain similar subject matter such as: Monitoring the operation of a network, and analyzing first and second results from the network to determine if the network is operating within a preselected value.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

1. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Santos et al., U.S. Patent 6,684,247 discloses a monitoring device and method for monitoring the state of a network.

Curley et al., U.S. Patent Pub. No. 2002/0120727 discloses a remote network monitor for monitoring transaction-based protocols.

Ordnanic et al., U.S. Patent 5,751,964 discloses a method and system for monitoring a network and updating thresholds based on collected data samples from the network.

2. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hassan Phillips whose telephone number is (571) 272-3940. The examiner can normally be reached on M-F 8:00am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Zarni Maung can be reached on (703) 308-6687. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

HP/
10/25/04



FRANTZ B. JEAN
PRIMARY EXAMINER